U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 November 2004

In the Matter of:

RONNIE LAY, JR.,
Claimant,

CASE NO: 2004 BLA 5167

v.

DIAMOND COAL COMPANY,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances:

Zaring Robertson, Esquire
For the Claimant

Lois Kitts, Esquire
For the Employer

Before: EDWARD TERHUNE MILLER,
Administrative Law Judge

DECISION AND ORDER–DENIAL OF BENEFITS

Statement of Case

This proceeding involves a first claim for benefits under the Black Lung Benefits Act (Act) as amended, 30 U.S.C. §§ 901 *et seq*. Claimant filed his claim after January 19, 2001. The claim is therefore governed by 20 C.F.R. Part 718 (2004).[1] Because Claimant last worked in

[1] All cited regulations are to Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Director's Exhibits are denoted "D-"; Claimant's Exhibits are denoted "CX-"; Employer's Exhibits are denoted "EX"; and citations to the hearing transcript are denoted "TR."

Kentucky, the claim is subject to the law of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director*, *OWCP*, 12 BLR 1-202 (1989) (en banc).

Issues

1. Whether Claimant has pneumoconiosis.
2. Whether Claimant's pneumoconiosis, if proved, was caused by his coal mining employment.
3. Whether Claimant has proved that he is totally disabled.
4. Whether such disability, if proved, resulted from Claimant's pneumoconiosis.

Procedural History

Ronnie Lay Jr. (Claimant) filed this claim for benefits on May 5, 2002. (D-2). The District Director for the Department of Labor (DOL) denied the claim because Claimant did not show that he had pneumoconiosis, that his pneumoconiosis was caused by coal dust exposure, or that he was totally disabled by pneumoconiosis. (D-30). The Director named Diamond Coal Company (Employer) as the responsible operator. *Id.* Employer stipulated to this designation. (TR-20). Following the denial of benefits, Claimant filed a timely request for a formal hearing, which was conducted on April 14, 2004 in Knoxville, Tennessee. Employer and Claimant were both represented by counsel. (TR-2). The Director was not represented. *Id.*

Findings of Fact

Background

Claimant was born April 20, 1951. (D-2). He married May Lay in 1973 and has supported her since their marriage. *Id.* Employer stipulated that Claimant worked as a coal miner for twenty-five years. (TR-7). Claimant's application for benefits and the medical opinions of Drs. Kabir, Baker, and Broudy, however, all report that Claimant worked as a coal miner for thirty-two years. Claimant's social security records suggest more limited employment, but Claimant testified credibly to employment that is not listed in his social security earnings report. (TR-13). Based on Claimant's testimony corroborated by the prior consistent reports of Drs. Kabir, Baker, and Broudy, presumably based on Claimant's prior consistent statements to these doctors, this tribunal finds that Claimant worked in the coal mines for thirty-two years. For most of Claimant's coal mining career, he worked as a scoop driver. (TR-15). He worked for Employer from 1980 until 2002, when he was laid off. (D-2). He has not worked since. (D-3). Claimant experiences shortness of breath and says it prevents him from sleeping at night. (D-2). He notes that he loses his breath altogether when he walks and often feels like he is smothering. *Id.*

The record contains numerous, disparate references to Claimant's smoking. In his deposition, Claimant reported that he smoked a half-pack of cigarettes per day for four years. (D-5). Dr. Kabir, however, recorded that Claimant smoked two packs per day for thirty years. (D-9). Dr. Baker found a half-pack per day for six years. (D-10). Dr. Broudy found that Claimant smoked a half-pack a day for twenty to thirty years. (D-12). Finally, at the formal

hearing, Claimant testified, without explaining his prior testimony, that he smoked a half-pack per day for about twenty-five years. (TR-25). Claimant's testimony at his hearing is roughly consistent with the smoking history reported by Dr. Broudy and is more credible than Claimant's testimony in his deposition. Thus, this tribunal finds a smoking history of twelve-and-a-half pack years.

Medical Evidence

Claimant relies on the medical examination and opinion of Dr. Baker, the physician provided by DOL for the requisite pulmonary examination under the governing regulations. Claimant also submitted a medical report by Dr. Kabir. Dr. Kabir, however, based his decision on an x-ray and pulmonary function test that are not of record. Dr. Kabir in fact wrote his opinion before the first pulmonary function test and x-ray of record were taken. Thus, his report has no probative value. Employer submitted x-ray evidence from Drs. Broudy and Dahhan. Employer submitted an x-ray interpretation by Dr. Wiot as a rebuttal of Dr. Baker's x-ray interpretation. Employer submitted pulmonary function tests and arterial blood gas studies by Drs. Dahhan and Broudy. Dr. Vuskovich rebutted Dr. Baker's pulmonary function test and arterial blood gas study. Employer submitted Drs. Broudy and Dahhan's medical reports. Finally, Employer designated Drs. Broudy and Wiot's interpretations of a CT-Scan as "other evidence."

Chest X-Ray Evidence

Ex. No.	Physician	B-Reader /BCR[2]	Date of X-Ray	Film Quality	Reading
D-10	Baker	B-reader	07/10/02	1	1/0
D-10	Goldstein	B-reader	07/10/02	2	Quality Reading Only
D-12	Broudy	B-reader	10/02/02	1	0/0
E-5	Dahhan	B-reader	02/25/04	1	0/0
D-29	Wiot	BCR/B-reader	07/10/02	2	No evidence of pneumoconiosis

[2] B-reader qualifications are based on the B-reader List published on DOL's website. *List of Approved B-Readers* (June 21, 1999), *at* http://www.oalj.dol.gov/public/blalung/refrnc/bread3.htm. "BCR" refers to a board-certified radiologist. Board Certification is based on the listings by the American Board of Medical Specialties. *American Board of Medical Specialties*, *at* abms.org (last visited September 1, 2004). This tribunal has taken judicial notice of the doctors' credentials based on these resources if the qualifications of the physicians are not otherwise of record. *See Maddaleni v. Pittsburg and Midway Coal Co.*, 14 BLR 1-135 (1990).

Pulmonary Function Tests[3]

Ex. No.	Physician	Date of Study	Age	Height[4]	Conf.	Qual.	FEV1	FVC	MVV	Coop./ Comp.
D-10	Baker	07/10/02	51	66.25	Yes	No	1.60	3.26	Didn't Perform	Fair/Good
D-12	Broudy	10/02/02	51	67	Yes	No	3.51	1.99	73	Fair/Fair
EX-4	Dahhan	02/25/04	52	66.5	No	---	---	---	---	Invalid for suboptimal effort

Blood Gas Studies

Ex. No.	Physician	Date of Study	Qualifying?	Altitude	Resting(R) Exercise(E)	PCO2	PO2	Comments
D-10	Baker	07/10/02	No	0-2999	R E	40 41	68 89	
D-12	Broudy	10/02/02	No	0-2999	R	38.9	72.5	Mild resting arterial hypoxemia
EX-6	Dahhan	02/25/04	No	0-2999	R E	39.3 38.4	79.2 74.7	

Physician's Opinions

Dr. Baker

Dr. Baker is a B-reader, who is board-certified in internal medicine with a board-certified subspecialty in pulmonary disease. Dr. Baker examined Claimant on July 10, 2002. Dr. Baker recorded that Claimant smoked a half-pack of cigarettes per day for six years and worked underground in the coal mines for thirty-two years.

Dr. Baker took a chest x-ray of Claimant and relied on his reading of the x-ray to diagnose Claimant with simple pneumoconiosis with a profusion of 1/0. *Id.* Dr. Baker concluded that Claimant's pneumoconiosis was caused by coal dust exposure. Dr. Baker also did a pulmonary function test and an arterial blood gas study. *Id.* Dr. Baker found that the values from the pulmonary function test indicated a moderate obstructive defect, which Dr. Baker attributed to coal dust exposure and smoking. Dr. Baker found that the values from the arterial blood gas studies indicated moderate resting arterial hypoxemia. Dr. Baker attributed the

[3] Where two values are indicated, the first represents the value before broncodilation and the second is the result after dilation. If only one set of numbers appears, no values were recorded post-dilation.

[4] As recorded by physician. The ALJ is required to resolve the height discrepancy contained in the record. *Protopappas v. Director*, *OWCP*, 6 BLR 1-221 (1983). The average of the reported heights (rounded to the nearest tenth) was 66.6 inches. This height was applied in this opinion.

hypoxemia to coal dust exposure and cigarette smoking. Dr. Baker determined that Claimant was totally disabled because his FEV_1 value was 51% of normal and his PO_2 was 68. *Id.*

Dr. Broudy

Dr. Broudy examined Claimant on October 2, 2002. (D-12). The examination consisted of a review of Claimant's history, a physical examination, spirometry, an arterial blood gas study, a chest x-ray, and a CT-scan. Based on the physical examination, Dr. Broudy concluded that Claimant was afebrile, had diminished lung aeration, and an expiratory delay on forced expiration. Dr. Broudy found that Claimant's spirometry, although nonqualifying under the Federal regulations, showed a mild to moderate obstruction. Dr. Broudy found that the blood gas values revealed "mild resting arterial hypoxemia with a slight elevation of the carboxyhemoglobin indicting [sic] continued exposure to smoke." Dr. Broudy concluded that there was no evidence of pneumoconiosis in the x-ray or CT-scan. He diagnosed a mild to moderately severe chronic obstructive airway disease due to cigarette smoking. Dr. Broudy is a B-reader and is board-certified in internal medicine with a board-certified subspecialty in pulmonary disease. *Id.*

Dr. Dahhan

Dr. Dahhan is board-certified in internal medicine and pulmonary disease and is a B-reader. Dr. Dahhan examined Claimant on February 25, 2004. (EX-6). His examination included a review of specified occupational and medical records, a physical examination, a pulmonary function test, an arterial blood gas study, and a chest x-ray. Dr. Dahhan reported that Claimant worked as a coal miner for twenty-two years and smoked a half-pack of cigarettes per day for thirty-one years. Dr. Dahhan's physical examination showed clear lungs. Dr. Dahhan interpreted the x-ray as 0/0. The arterial blood gas study revealed mild hypoxemia. The pulmonary function test was invalid due to suboptimal effort. After his examination, Dr. Dahhan concluded that Claimant did not have pneumoconiosis or an impairment linked to coal dust exposure. Dr. Dahhan further opined that Claimant was capable of returning to his coal mine employment.

Dr. Wiot

Dr. Wiot reread the x-ray dated July 10, 2001 that was taken by Dr. Baker. (D-13). Dr. Wiot did not find any evidence of coal worker's pneumoconiosis. *Id.* Dr. Wiot also interpreted the CT-scan taken by Dr. Broudy on October 2, 2002 and again found no evidence of pneumoconiosis. Dr. Wiot is a board-certified radiologist and a B-reader. *Id.*

Dr. Vuskovich

Dr. Vuskovich is board-certified in occupational medicine and a B-reader. (EX-2). Dr. Vuskovich reviewed the pulmonary function test and arterial blood gas study taken by Dr. Baker on July 10, 2002. (EX-1). Employer offered Dr. Vuskovich's opinion to rebut the opinion of Dr. Baker. After examining Dr. Baker's pulmonary function test, Dr. Vuskovich concluded that "it wasn't a valid study. The max effort especially at the start of the effort was such that the FEV1

value would be facetiously[5] lowered." *Id.* He added that the FVC value was normal and did not show evidence of a restrictive impairment.

Dr. Vuskovich opined that Claimant's arterial blood gas study taken by Dr. Baker showed mild resting hypoxemia but he noted that the $P0_2$ value rose after exercise. This indicated to Dr. Vuskovich that there was no impediment to the diffusion of gas in the alveoli and that there was no cardiac problem because the heart was able to respond to exercise and pump blood through the lungs. This allows the lungs to function adequately to oxygenate Claimant's blood and to get oxygen to Claimant's muscles, brain, and vital organs. Based on this information, Dr. Vuskovich opined that Claimant was capable of returning to his coal mining employment. (EX-1).

Discussion and Conclusions of Law

To be entitled to benefits under Part 718, Claimant must establish by a preponderance of evidence that (1) he has pneumoconiosis, (2) the pneumoconiosis arose from his coal mine employment, (3) he is totally disabled, and (4) the total disability is due at least in part to pneumoconiosis. *Gee v. M.G. Moore & Sons*, 9 BLR 1-4 (1986). In the present case, Claimant has not established that he has pneumoconiosis or that he is totally disabled. Claimant's request for benefits must therefore be denied.

Existence of Pneumoconiosis

Claimant has not demonstrated the existence of pneumoconiosis. The applicable regulations define "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising from coal mine employment." § 718.201(a). This definition includes both "clinical" and "legal" pneumoconiosis. *Id.* "Legal" pneumoconiosis is broader than "clinical" pneumoconiosis and includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." § 718.201(a)(2). Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray, (2) a properly conducted and reported biopsy or autopsy, (3) reliance on the presumptions set forth in §§ 718.304 through 306, or (4) a physician's finding of pneumoconiosis as defined by § 718.201 that is based on objective evidence and a reasoned medical opinion. The record has no evidence of a biopsy, and the presumptions under §§ 718.304, 718.305, and 718.306 do not apply because there is no evidence of complicated pneumoconiosis, the claim was filed after 1982, and Claimant is alive. Claimant must therefore rely on chest x-rays and medical opinions to establish pneumoconiosis.

Claimant's x-ray evidence does not establish the existence of pneumoconiosis. The relative qualifications of the physicians weigh against a finding of pneumoconiosis based on the x-ray evidence. An x-ray interpretation by a dually-qualified physician can properly be afforded more weight than an interpretation by a physician who is not so qualified. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). The only positive reading for pneumoconiosis was by Dr. Baker, a B-reader, who interpreted the July 10, 2002 x-ray as positive for pneumoconiosis

[5] Whether this was a misspeak, a typo by the court reporter, or Dr. Vuskovich thought the pulmonary function test results were funny is not clear.

with a profusion of 1/0. (D-10). Dr. Wiot, a B-reader and a board-certified radiologist, reread this x-ray and found it was negative for pneumoconiosis. (D-11). Because Dr. Wiot is a dually-qualified physician and Dr. Baker is not, Dr. Wiot's negative interpretation can properly be afforded more weight. This interpretation is further supported by the negative interpretations by two additional B-readers: Dr. Broudy on an x-ray dated October 2, 2002 and Dr. Dahhan on an x-ray dated February 25, 2004. (D-12; EX-6).

Claimant's medical opinions likewise do not establish pneumoconiosis. To establish "legal" pneumoconiosis, Claimant must show that the medical opinions of record demonstrate a chronic disease or impairment arising from his coal mine employment. 20 C.F.R. § 718.201 (a)(2). The medical opinions in Claimant's record do not establish such disease or impairment. Dr. Baker concluded that Claimant suffered from chronic obstructive pulmonary disease engendered by coal dust exposure and smoking. (D-10). Dr. Baker also documented that Claimant suffered from a moderate pulmonary impairment that Dr. Baker again linked to coal dust exposure and smoking. Dr. Baker's decision is supported by a low FEV_1 value from Claimant's spirometry and by blood gas values indicating moderate hypoxemia. Dr. Baker does not offer any other support for his opinion.

Upon further examination, the pulmonary function tests and arterial blood gas studies do not support Dr. Baker's decision. Dr. Vuskovich reviewed Dr. Baker's pulmonary function tests and concluded that the results were invalid because of a suboptimal effort. (EX-1). Dr. Vuskovich supported his conclusion by arguing that the FVC value was normal, which indicated that Claimant did not suffer from a restrictive impairment, and that the FEV_1 value was inaccurately low because the tracings indicated suboptimal effort by Claimant, especially at the start of the test. The most convincing argument supporting Dr. Vuskovich's rebuttal is the pulmonary function tests taken by Dr. Broudy on October 2, 2002, less than three months after Dr. Baker's tests. Dr. Broudy's pulmonary function test resulted in a significantly higher FEV_1 value than did Dr. Baker's test. (D-12). Dr. Vuskovich's opinion of suboptimal effort explains the increase in Claimant's spirometry. Thus, the pulmonary function test performed by Dr. Baker does not support a finding of pneumoconiosis.

Claimant's arterial blood gas studies also fail to support Dr. Baker's decision. Dr. Baker concluded that Claimant suffered from moderate hypoxemia, which Dr. Baker linked to smoking and coal dust exposure. (D-10). Dr. Broudy performed a second arterial blood gas study and concluded that Claimant suffered from mild hypoxemia. Unlike Dr. Baker, however, Dr. Broudy linked the hypoxemia exclusively to cigarette smoking. Dr. Broudy argued that the arterial hypoxemia coupled with an elevation of the carboxyhemoglobin, was indicative of cigarette smoking. (D-12). Dr. Baker does not provide any support for his opinion that the low blood gas values are linked to coal dust exposure. (D-10). Thus, Dr. Broudy's decision is better reasoned and more persuasive.

Unlike Dr. Baker, the medical opinions of Drs. Broudy and Dahhan both conclude that Claimant does not suffer from pneumoconiosis and does not have a respiratory or pulmonary impairment linked to coal dust exposure. Because Dr. Baker's opinion is not supported by the overall weight of the evidence in the record, Claimant has not carried his burden of proving pneumoconiosis through his medical opinions. Claimant's x-ray evidence and medical opinions,

considered together and in light of the whole record, do not establish by a preponderance of the evidence that Claimant has pneumoconiosis.

Pneumoconiosis from Employment

In light of the above finding that Claimant does not have pneumoconiosis, this tribunal need not consider the issue of causation by his employment history.

Total Disability

Claimant is not totally disabled under the Act. Under the regulations, a miner is totally disabled if, in the absence of contrary probative evidence, (1) he has qualifying pulmonary function tests, (2) he has qualifying arterial blood gas tests, (3) he has pneumoconiosis and is suffering from cor pulmonale with right-sided congestive heart failure, or (4) a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from performing his usual coal mine work or work requiring skills comparable to those of any employment in a mine in which the miner previously engaged with some regularity over a substantial period of time. § 718.204 (b)(2). The record contains no evidence that Claimant has cor pulmonale with right-sided congestive heart failure, so Claimant must rely on his pulmonary function tests, arterial blood gas studies, and medical opinions to establish total disability.

Claimant's pulmonary function tests and arterial blood gas studies do not establish total disability. Claimant underwent two pulmonary function tests deemed valid.[6] Neither test produced qualifying results under the Federal regulations. Part 718 Appendixes B & C. The pulmonary function test performed by Dr. Baker resulted in a FEV_1 value below the federal standards for disability, but as discussed above, these results are inconsistent with Dr. Broudy's results and, as argued by Dr. Vuskovich, are likely due to suboptimal effort. Furthermore, a low FEV_1 value, standing alone, is not grounds for a finding of total disability under the federal regulations. § 718.204(b)(2)(i). Claimant's arterial blood gas studies also fail to establish total disability. There are three blood gas studies of record performed at rest and two studies performed after exercise. None of the studies produced qualifying results.

Finally, the medical opinions of record do not establish total disability. Drs. Dahhan and Broudy both concluded that Claimant was not totally disabled and was capable of returning to his work in the coal mines.[7] Dr. Baker provides the sole opinion in favor of total disability. Dr. Baker based his opinion on Claimant's pulmonary function tests and on Claimant's PO_2 value. As discussed above, Claimant's pulmonary function test does not support a finding of total

[6] A third test, performed by Dr. Dahhan, was invalid because of suboptimal effort.

[7] There is one instance in Dr. Dahhan's deposition where he apparently states that Claimant is totally disabled. (EX-6). After careful review of the record, this tribunal concludes that Dr. Dahhan's statement was either a misspeak or, more likely, a clerical error by the court reporter. The statement is inconsistent with Dr. Dahhan's opinion as stated elsewhere in the record and is inconsistent with the substance of Dr. Dahhan's testimony. Furthermore, the attorneys in the deposition, both for the Claimant and for Employer, seem to proceed as if Dr. Dahhan concluded that Claimant was not totally disabled. This is strong evidence that the statement was a clerical error and does not represent Dr. Dahhan's opinion in this case. This tribunal therefore accepts Dr. Dahhan's opinion as stated elsewhere in the record, that Claimant is not totally disabled.

disability. Claimant's PO_2 levels are likewise an insufficient predicate for total disability. As discussed above, the levels are nonqualifying under the federal standards. Furthermore, Claimant's blood gas levels are higher after exercise than at rest. Dr. Vuskovich convincingly argued that this increase weighs against a finding of total disability. According to Dr. Vuskovich, the increase in blood gas levels after exercise indicated that there is no impediment to the diffusion of gas in the alveoli and that there was no cardiac problem because the heart could respond to exercise and pump blood through the lungs. This allows the lungs to function adequately to oxygenate Claimant's blood and to get oxygen to Claimant's muscles, brain, and vital organs. (EX-1).

After consideration of all the evidence of record, this tribunal concludes that Claimant has failed to establish total disability based on a preponderance of the evidence.

Total Disability due to Pneumoconiosis

Because Claimant is not totally disabled, the issue of causation regarding total disability is moot.

ORDER

The claim of Ronnie Lay Jr. for Black Lung benefits under the Act is hereby denied.

A

Edward Terhune Miller
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, NW, Room N-2117, Washington, D.C. 20001.